

LAW AND PUBLIC SAFETY

(a)

DIVISION ON CIVIL RIGHTS

Rules Pertaining to the Family Leave Act

Proposed Readoption with Amendments: N.J.A.C. 13:14

Authorized By: Craig Sashihara, Director, New Jersey Division on Civil Rights.

Authority: N.J.S.A. 34:11B-16.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2014-034.

Submit comments by June 6, 2014, to:

Estelle Bronstein, Assistant Director
Department of Law and Public Safety
Division on Civil Rights
PO Box 89
Trenton, New Jersey 08625-0089

The agency proposal follows:

Summary

The New Jersey Division on Civil Rights (DCR), in the Department of Law and Public Safety, enforces the New Jersey Family Leave Act (NJFLA), N.J.S.A. 34:11B-1 to 16. Pursuant to N.J.S.A. 52:14B-5.1.b, DCR's Rules Pertaining to the Family Leave Act, N.J.A.C. 13:14, expire on February 6, 2014. As this notice of rules proposed for readoption with amendments has been filed with the Office of Administrative Law on or before the chapter expiration date, the expiration date of this chapter is extended 180 days to August 5, 2014, pursuant to N.J.S.A. 52:14B-5.1.c(2).

DCR has reviewed these rules and has determined them to be necessary, reasonable, and proper for the purpose for which they were originally promulgated. However, pursuant to its rulemaking authority found at N.J.S.A. 34:11B-16, DCR proposes amendments to N.J.A.C. 13:14 to clarify, without expanding, the intent of the NJFLA. The proposed amendments incorporate recent amendments to the NJFLA, and ensure, where appropriate, consistency with the requirements of the Federal Family and Medical Leave Act.

The Division on Civil Rights is charged with enforcing the NJFLA, which was enacted in 1989, and entitles most employees in the State to a maximum of 12 weeks of family leave from employment in a 24-month period. Under the NJFLA, eligible employees may take family leave to provide care needed because of the birth or placement for adoption of a child, or the serious health condition of a child, parent, spouse, or civil union partner. Employees returning from family leave are entitled to be restored to the position held prior to the leave or to an equivalent position.

On September 16, 1991, the DCR Director promulgated rules necessary for the implementation and enforcement of the NJFLA. The rules were readopted effective September 16, 1996, and August 20, 2001, and were readopted with amendments effective February 6, 2007. The rules proposed for readoption with amendments will continue to provide principles for interpreting the NJFLA consistent with the Legislature's intent, and will provide continued guidance to employers and employees regarding their rights and obligations under the NJFLA.

On the Federal level, the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601 et seq., allows eligible employees of a covered employer to take up to 12 weeks of job-protected leave in any 12-month period. Under FMLA, leave may be taken to care for a newborn or newly adopted child, for placement of a child with the employee for adoption or foster care, to care for a family member with a serious health condition, or because of the employee's own serious health condition. The U.S. Labor Department's Wage and Hour Division promulgated final rules under the FMLA, effective February 6, 1995, 29 CFR 825. Although DCR's rules predate these Federal rules, DCR's rules have been largely consistent with the Federal rules. The FMLA rules

were most recently amended effective March 8, 2013, and DCR has reviewed the amended FMLA rules to ensure NJFLA is consistent with the FMLA. There remain substantive provisions of the FMLA and the NJFLA that differ in several important respects, and DCR's rules have provided important guidance to employers and employees in recognizing the differences between the Federal and State leave laws, and how the protections of the NJFLA relate to the protections provided by the FMLA and other laws.

The following is a summary of the rules proposed for readoption and proposed amendments.

N.J.A.C. 13:14-1.1 sets forth the purpose of the rules. N.J.A.C. 13:14-1.2 sets forth definitions that are used in the rules.

DCR proposes adding a definition of "family member" consistent with the definition in the NJFLA as amended by P.L. 2006, c. 103, § 89, effective February 19, 2007, to clarify that an employee may take leave under the NJFLA due to a serious health condition of only specified family members: the employee's child, spouse, parent, or civil union partner.

DCR proposes amending the definition of "child" to include a child to whom the employee is a "resource family parent," to make the definition consistent with a 2004 amendment to the NJFLA (P.L. 2004, c. 130, § 111, effective August 27, 2004). For ease of reference, DCR also proposes adding a definition of "parent," as it is currently defined in the NJFLA.

DCR proposes amending the definition of "eligible employee" to follow the existing definition in the NJFLA by removing the first reference to the employer being in the State of New Jersey, and correcting a grammatical error.

DCR proposes to amend the definition of "employer," to clarify that the State, any political subdivision thereof, and all public offices, agencies, boards, and bodies are employers covered by the NJFLA, even if that government entity does not meet the 50-employee requirement applicable to private businesses. Although this was the intent of the 2007 amendment to N.J.A.C. 13:14-1.3, DCR has received a number of inquiries from the public showing that further clarification is needed. The proposed amendment is consistent with the definition of "employer" in the NJFLA and is also consistent with the manner in which public employers are governed under the FMLA. See 29 U.S.C. § 2611(4)(1)(iii); 29 CFR 825.108(d).

DCR proposes to amend the definition of "intermittent leave" to more clearly convey the intent of the NJFLA, without changing the intended meaning, by replacing language regarding non-consecutive leave taken in intervals with language specifying that the leave is due to a single qualifying reason but taken in separate periods of time, provided each period is at least one workweek.

DCR proposes to merge the definition of "reduced leave" into the definition of "reduced leave schedule" and to delete reference to the leave as not more than 24 consecutive weeks as redundant with the substantive rule. These amendments are proposed to more clearly convey the intent of the NJFLA, without changing the intended meaning.

DCR proposes an amendment to correct a typographical error in the definition of "serious health condition."

N.J.A.C. 13:14-1.3 identifies the types of employers that are covered by the NJFLA. N.J.A.C. 13:14-1.4 sets forth the duration and time periods in which leave may be taken, and addresses employee notice obligations. DCR proposes amending this section to delete reference to varying notice periods based on the type of leave requested because the 2007 amendments to N.J.A.C. 13:14-1.5 established a uniform notice requirement for all types of leave. It appears that it was an oversight to retain the reference to varying notice periods in this section. In addition, DCR proposes to add that the employee must provide the employer with notice no later than 30 days prior to taking leave except where emergent circumstances warrant shorter notice, as is required in N.J.A.C. 13:14-1.5.

N.J.A.C. 13:14-1.5 sets forth the manner in which an employee can take leave based on specific triggering events and the employee's obligation to provide advance notice of the need to take leave. DCR proposes readopting this section without amendment.

N.J.A.C. 13:14-1.6 sets forth the manner in which NJFLA relates to and interacts with other laws. N.J.A.C. 13:14-1.7 sets forth the

requirements concerning the use of accrued paid leave while taking leave pursuant to the NJFLA. N.J.A.C. 13:14-1.8 sets forth the circumstances under which an employee is permitted to engage in other employment while on leave pursuant to the NJFLA. N.J.A.C. 13:14-1.9 sets forth standards under which an employer is permitted to deny leave under the NJFLA to particular salaried employees in the highest-paid tier of the employer's staff. N.J.A.C. 13:14-1.10 sets forth the requirements for an employer to obtain a certification from the employee or a health care provider regarding the reason the employee is requesting leave under the NJFLA. DCR proposes amending the heading to include "or health care provider" and subsection (b) to clarify the types of health care providers who are qualified to provide such a certification regarding the serious health condition of a family member of the employee. This section currently includes any "health care provider determined by the Director to be capable of providing adequate certification." DCR finds that this provision is not helpful to employers or employees, as there is no specific procedure for the DCR Director to determine the adequacy of a health care provider in a particular situation, and it would be inefficient for DCR to make such determinations on a case-by-case basis. Moreover, health care provider is already defined in N.J.A.C. 13:14-1.2, and that definition is clear and complete enough to provide appropriate guidance to employers and employees. DCR proposes to amend this section to delete reference to the health care provider being "duly licensed" as this is already a requirement of the provider as defined by N.J.A.C. 13:14-1.2.

DCR also proposes to amend N.J.A.C. 13:14-1.10(b)1 to require that a health care provider's certification states the approximate date on which the serious health condition commenced and provides specific information showing that the family member has a serious health condition.

N.J.A.C. 13:14-1.11 sets forth the standards for reinstatement of an employee following a leave pursuant to the NJFLA. DCR proposes readopting this section without amendment.

N.J.A.C. 13:14-1.12 sets forth the requirements concerning multiple requests for family leave from members of the same family.

N.J.A.C. 13:14-1.13 requires that where employers provide benefits to employees taking other types of leave, the employer must treat employees taking NJFLA leave the same as employees taking the type of leave that most closely resembles NJFLA leave.

N.J.A.C. 13:14-1.14 addresses a covered employer's obligation to provide notice of NJFLA rights to employees. DCR proposes to amend subsection (b) to update the link to DCR's website, which has been changed to www.njcivilrights.gov, and to amend subsection (a) to note that DCR's official Family Leave Act posters are available on DCR's website, and to include the website address.

N.J.A.C. 13:14-1.15 prohibits employers from retaliating against employees who seek information regarding the NJFLA or exercise any right under the NJFLA.

N.J.A.C. 13:14-1.16 explains that DCR shall process NJFLA complaints in the same manner as complaints filed with DCR alleging violations of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Those procedures are set forth in DCR's Rules of Practice and Procedure, N.J.A.C. 13:4.

A 60-day comment period is provided in this notice of proposal and therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, the notice is excepted from the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

Social Impact

The rules proposed for readoption with amendments will have a beneficial social impact on all eligible employees in the State of New Jersey and their families. The rules implement the stated purpose of the Legislature in promoting the economic security of families by permitting employees to take time off due to the birth or adoption of a child or because of the serious health condition of a family member, without risking loss of employment or retaliation by employers.

The rules also recognize the practical difficulties facing employers in providing the leave required by the NJFLA and, therefore, clarify employers' rights to advance notice, to obtain medical certifications showing the need for leave, and to make operational changes in certain circumstances to lessen the impact on the employer's operations. The

rules will have a beneficial social impact by clarifying the rights and obligations of employers and employees under the NJFLA, and how the NJFLA interacts with the Federal FMLA and other laws. If these rules are not readopted and amended to provide additional clarification, employers and employees would be deprived of needed guidance.

Economic Impact

The rules proposed for readoption with amendments will not economically impact employers to a degree greater than they are presently, because all legal obligations arising under the rules have been mandated by the NJFLA. Therefore, the rules proposed for readoption with amendments present no new legal obligations. The rules may assist the regulated entities in complying with the existing legal obligations by clarifying rights, obligations, and permissible and impermissible conduct, thus obviating the need to retain professional services to assist in complying with the NJFLA.

Federal Standards Statement

A Federal standards analysis is not required because the rules are intended to clarify and interpret the New Jersey Family Leave Act, and are not intended to implement or comply with any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards, or requirements. The Federal FMLA allows eligible employees of a covered employer to take up to 12 weeks of job-protected leave in any 12-month period. Under the FMLA, leave may be taken to care for a newborn or newly adopted child, for placement of a child with the employee for adoption or foster care, to care for a family member with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job. To the extent that the rules proposed for readoption with amendments provide rights or obligations that exceed similar provisions in Federal law, the NJFLA mandates such provisions.

Jobs Impact

The rules proposed for readoption with amendments will have no impact on the creation or loss of jobs in the State.

Agriculture Industry Impact

The rules proposed for readoption with amendments will have no impact on the agricultural industry.

Regulatory Flexibility Statement

The rules proposed for readoption with amendments will not impose any reporting or recordkeeping requirements on small businesses, as the term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The NJFLA applies to employers having 50 or more employees. Therefore, some covered employers may be small businesses as that term is defined in the Regulatory Flexibility Act. However, these rules do not impose any reporting, recordkeeping, or other compliance requirements beyond those imposed by existing State and Federal law.

Housing Affordability Impact Analysis

DCR does not anticipate that the rules proposed for readoption with amendments will have any impact on affordable housing in New Jersey or would change the average costs associated with housing, because the rules proposed for readoption with amendments clarify statutory requirements for family leave pursuant to the NJFLA.

Smart Growth Development Impact Analysis

DCR does not anticipate that the rules proposed for readoption with amendments will have any impact on smart growth, or would change housing production in Planning Areas 1 or 2, or within designated centers under the State Development and Redevelopment Plan in New Jersey because the rules proposed for readoption with amendments clarify statutory requirements for family leave pursuant to the NJFLA.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 13:14.

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 1. GENERAL PROVISIONS

13:14-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

... “Child,”[.] for the purpose of determining whether an employee is eligible for family leave because of such employee’s parental status, means a child as defined in the Act to whom such employee is a biological parent, adoptive parent, foster parent, **resource family parent**, step-parent, or legal guardian, or has a “parent-child relationship” with a child as defined [by law] **in N.J.S.A. 34:11B-3**, or has sole or joint legal or physical custody, care, guardianship, or visitation with a child.

... “Eligible employee” means any individual employed by the same employer [in the State of New Jersey] for 12 months or more, [and] **who** has worked 1,000 or more base hours during the preceding 12 month period. An employee is considered to be employed in the State of New Jersey if:

1.-2. (No change.)

“Employer” means an employer as defined in the Act, which employs 50 or more employees, whether employed in New Jersey or not, for each working day during each of 20 or more calendar workweeks in the then current or immediately preceding calendar year. “Employer” includes the State, any political subdivision thereof, and all public offices, agencies, boards, or bodies, **regardless of whether that government entity employs 50 or more employees.**

“Family member” means a child, parent, spouse, or partner in a civil union.

... “Intermittent leave” means [a non-consecutive leave comprised of intervals each of which is at least one but less than 12 workweeks within a consecutive 12 month period] **leave due to a single qualifying reason (the serious health condition of a specific family member or the birth or placement for adoption of a child), taken in separate periods of time, where each period of leave is at least one workweek.**

“Parent” means a person who is the biological parent, adoptive parent, resource family parent, step-parent, parent-in-law, or legal guardian, having a “parent-child relationship” with a child as defined in N.J.S.A. 34:11B-3, or having sole or joint legal or physical custody, care, guardianship, or visitation with a child.

[“Reduced leave” means a non-consecutive leave of up to the equivalent of 12 workweeks which is taken in increments of not less than one workday, unless otherwise agreed to by the employee and employer, but less than one workweek at a time.]

“Reduced leave schedule” means [a reduced leave that is scheduled for not more than 24 consecutive weeks.] **leave due to a single qualifying reason (the serious health condition of a specific family member or the birth or placement for adoption of a child), that is scheduled for fewer than an employee’s usual number of hours worked per workweek, but not for fewer than an employee’s usual number of hours worked per workday, unless agreed to by the employee and the employer.**

“Serious health condition” means an illness, injury, impairment, or physical or mental condition which requires:

1.-2. (No change.)

As used in this definition, “continuing medical treatment or continuing supervision by a health care provider” means:

1.-4. (No change.)

5. Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity [or] **of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).**

...

13:14-1.4 Terms of leave

(a) Family leave may be taken for up to 12 weeks within any 24-month period. The leave may be paid, unpaid, or a combination of paid and unpaid. The employee who requests the leave must provide the employer [reasonable advance notice, the length of which will be determined by the type of leave requested, as set forth in N.J.A.C. 13:14-1.5] **with notice no later than 30 days prior to the commencement of the leave, except where emergent circumstances warrant shorter notice.**

(b)-(d) (No change.)

13:14-1.10 Certification by an employee or health care provider

(a) (No change.)

(b) An employer may require that any period of family leave be supported by certification issued by a [duly licensed] health care provider [or any other health care provider determined by the Director to be capable of providing adequate certification].

1. Where the certification is for the serious health condition of a family member of the employee, the certification shall be sufficient if it states the **approximate** date on which the serious health condition commenced, the probable duration of the condition and the medical facts within the provider’s knowledge [regarding the condition] **showing that the family member’s health condition meets the criteria of a serious health condition.**

2.-3. (No change.)

(c) (No change.)

13:14-1.14 Notice to employees

(a) Employers covered under the Act shall display the official Family Leave Act poster of the Division on Civil Rights in accordance with N.J.A.C. 13:8-2.2. **The poster is available for printing from the Division’s website, www.njcivilrights.gov.**

(b) If an employer covered under the Act maintains written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning leave under the Act and employee obligations under the Act must be included in the handbook or other document. If an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer shall provide written guidance to each of its employees concerning all the employee’s rights and obligations under the Act. Employers may duplicate and provide its employees a copy of the NJFLA Fact Sheet available on the Division’s website, [www.njcivilrights.org] **www.njcivilrights.gov**, to provide such guidance.

(a)

DIVISION OF STATE POLICE

Regulation of Bounty Hunters

Proposed Readoption with Amendments: N.J.A.C. 13:55B

Proposed Repeals: N.J.A.C. 13:55B-2.5 and 3

Authorized By: Colonel Joseph Fuentes, Superintendent, New Jersey State Police.

Authority: N.J.S.A. 45:19-40.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2014-039.

Submit written comments by June 6, 2014, to:

Colonel Joseph R. Fuentes, Superintendent
c/o Private Detective Unit
Division Headquarters
PO Box 7068
West Trenton, New Jersey 08638

The agency proposal follows:

Summary

In accordance with N.J.S.A. 52:14B-5.1.b, N.J.A.C. 13:55B, Regulation of Bounty Hunters, will expire on March 5, 2014. Since this notice of rules proposed for readoption with amendments has been filed